***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

Original w/ affidavit of mailing

# 75-1411

*To be argued by*
ETHAN LEVIN-EPSTEIN

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P/S

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 75-1411**

UNITED STATES OF AMERICA,

*Appellee,*

*—against—*

ROCCO MASTRANGELO and
JOSEPH ADDOLORIA,

*Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

## BRIEF FOR THE APPELLEE


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UNITED STATES OF AMERICA,

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ROCCO MASTRANGELO and JOSEPH ADDOLORIA,

*Appellants.*

## BRIEF FOR THE APPELLEE

### Preliminary Statement

Rocco Mastrangelo and Joseph Addoloria appeal from judgments entered November 21, 1975, in the United States District Court for the Eastern District of New York (Platt, *J.*), convicting them, in Count One of the indictment, of stealing, on March 3, 1972, a quantity of ladies' knitted garments, having a value in excess of $100.00, which goods were traveling in interstate commerce from New York to New Jersey, such theft constituting a violation of Title 18, United States Code, section 659. On Count Two of the indictment, the appellants were convicted of conspiring to commit the theft alleged in Count One, and further of conspiring to receive and possess the stolen garments, knowing them to have been stolen, all in violation of Title 18, United States Code, section 371. On Count Three, the remaining count in the indictment, appellants were convicted of unlawfully carrying and using a firearm during the commission of the

federal offense alleged in Count One, in violation of Title 18, United States Code, sections 924(c)(1) and (2).[1] Appellants were found guilty, after an eight-day jury trial, on October 7, 1975.[2] Appellants are free on bail pending this appeal.

On appeal, appellants jointly raise four issues. First, whether the District Court committed reversible error by permitting the Government to prove certain prior and subsequent similar criminal acts. Second, whether there was a pre-indictment delay created by the prosecution with the intent to gain a tactical advantage over appellants, which delay caused them to be substantially prejudiced. Third, whether the trial judge's interaction with one of the defense attorneys prevented either appellant from receiving a fair trial, and fourth, whether sufficient evidence was adduced to sustain the guilty verdicts.

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[1] Mastrangelo was sentenced to serve a seven year prison term pursuant to 18 U.S.C. § 4208(a)(2), on Count One. A five year sentence was imposed concurrently, on Count Two, and a seven year suspended sentence on Count Three with a five year consecutive probation term. Addoloria was sentenced to serve a prison term of nine years on Count One, pursuant to 18 U.S.C. § 4208(a)(2). In addition, he received a five year concurrent term on Count Two, with a nine year suspended sentence on Count Three, to be followed by a five year consecutive term of probation.

[2] Three co-defendants, Charles Peters, Gerard Collins and Paul Flammia had been previously severed from the case and entered pleas of guilty to Count Three. They received eight, eight and six year prison terms, respectively, to run consecutively to prison terms they were already serving for the State of New York. Gerald Barry, a fourth co-defendant, entered a plea of guilty to a superseding information charging him with one count of being an accessory after the fact in violation of 18 U.S.C. § 3. The fifth and final co-defendant, Charles Forbes, having been previously severed, was convicted of Count Two after a three day jury trial before Chief Judge Jacob Mishler. Neither Barry nor Forbes have been sentenced.

## Statement of Facts

### I. The Government's Case

Paul Fleischer, an admitted hijacker and convicted felon (T. 60-72),[3] was the Government's main witness. He told of how he met one Charles Peters in late 1971, and was propositioned to join a hijacking crew that Peters was organizing (T. 73). At Peters' invitation Fleischer volunteered that he knew of a "drop" that the gang could use in New Jersey (T. 74). Peters was encouraged and told Fleischer of two other members of the crew; a "Paulie Porkchop" and a "Joe Baldy". Fleischer noted that "Paulie Porkchops" was the nickname of one Paul Flammia, and he identified the appellant Addoloria, in court, as "Joe Baldy" (T. 74-75). After this initial conversation with Peters in the Arctic diner in Brooklyn, Fleischer and Peters drove out to the "drop" in New Jersey.[4]

Just outside the Lincoln Tunnel, Peters and Fleischer went to a truck repair business owned by Charles Forbes and met with him there. At this meeting Fleischer and Peters discussed the use of Forbes' "drop" with him, and it was agreed that the crew would bring whatever trucks they stole to Forbes' (T. 77). Forbes agreed to this and it was decided that he would be paid $2,000 for every tractor-trailer brought to him and $1,500 for every "straight job."[5] There was no discussion, at this point,

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[3] References preceded by "T." refer to pages in the transcript of the trial.

[4] Fleischer explained that a "drop" was a place where stolen trucks were brought in order to transfer the stolen merchandise to "clean" or non-suspicious vehicles. (T. 73-74).

[5] Fleischer testified that he had met Forbes before when they were introduced by another receiver of stolen property with whom he had previously dealt (T. 78-80). On many prior occasions, Fleischer noted, he had promised to bring stolen trucks to Forbes, but the promises had not materialized (T. 80-84). These prior visits occurred in 1971 (T. 85), and on some occasions a man named Gerald Barry was present (T. 86).

about any specific truck; only that Forbes' business would be available whenever the need arose.

Following this initial meeting with Forbes and Peters, Fleischer met daily with Peters, Flammia, Gerard "Rebel" Collins, and the appellants Addoloria and Mastrangelo (T. 95-96). These meetings occurred in the house shared by Collins and Flammia in Queens (T. 87). At these meetings the group discussed various facets of the truck hijacking business in which they were engaged. They discussed the fact that Fleischer (who had been employed as a truck driver for the Airfreight Haulage Company) had connections and sources of information at John F. Kennedy International Airport which he could draw on for likely trucks to steal. They discussed and agreed that each of the six group members would "work on the street" trying to spot potential hijacking prospects (T. 90). Each of the appellants were present at, and participated in these daily meetings, and each agreed to report back to the group with any ideas for thefts they might have (T. 91-92). The daily meetings continued, on a weekday basis, throughout January, 1972, with the six co-conspirators meeting at Flammia's to discuss their plans. The meetings varied in time, some taking less than one hour (T. 95-97).

## A. The Lerner Dress Shops Theft

In the middle of January, 1972, Fleischer reported to the group that he knew of a "give-up" at Kennedy Airport (T. 97). He told the group, including the appellants, that a driver named Richie, who worked for Airfreight Haulage, had approached him to propose the theft of twenty-six uninvoiced cartons of merchandise belonging to the Lerner Shops (T. 98). The group agreed to the theft and Fleischer arranged with Richie for the delivery. Further arrangements were made to sell the stolen goods to Peters'

sister, Tina (T. 99-103). Both appellants were present at the discussions about this initial theft, and both actively participated in bringing the plan to fruition (T. 101-106). After the goods were sold to Tina, each appellant took his share of the proceeds (T. 102-112).

## B. The Arlene Knitwear Company Theft

### (1) The Hijacking

After the Lerner Dress shop incident the group continued to meet at Flammia's on a regular basis to discuss further hijacking plans (T. 112). In mid-February a truckload of tools belonging to the Royal Merchandise Company was stolen (T. 113), and then the attention of the group focused on the Arlene Knitwear Company.

In about the third week in February, Fleischer reported to the appellants, and the others, that he had noticed "a pretty good load" (T. 114). This prospect turned out to be a truck belonging to the Arlene Knitwear Company, which Fleischer had seen being loaded numerous times on Troutman Street in Brooklyn. When he was questioned by the group as to the merits of taking this load, he said that it would probably be worth approximately $10,000 (T. 114). It was agreed that Fleischer would continue to watch the truck each morning, count the pieces being loaded, and report back to the group (T. 115-116). In the ensuing days and weeks Fleischer carried out the group's instructions and it was ultimately decided that this truck would be hijacked on Friday, March 3, 1972 (T. 118).

A final planning meeting was held at Flammia's on Thursday, March 2. On that day the six crew members, including appellants, met to discuss the details of the impending theft (T. 119). As of that time the plan called for the truck to be hijacked in Brooklyn and then driven

to "Forco's"—Charles Forbes' place of business in New Jersey (T. 120). During the actual theft Fleischer and Collins, while armed with guns, were to forcibly remove the driver from the stolen truck and place him in a stolen station wagon driven by Peters (T. 121). Peters, in order to stop the truck, was to have cut it off in front with the station wagon (T. 123). Appellant Addoloria's role called for him to block the truck's possible escape to the rear with his car (T. 122). Appellant Mastrangelo and Flammia were assigned to go directly to Forbes' in New Jersey and wait to assist in off-loading the stolen shipment when it arrived (T. 122-123).

As planned, the group met at Flammia's on the following morning, March 3, 1972 (T. 125). All were present, including the two appellants (T. 126). Shortly after 7:00 A.M. Fleischer and Addoloria drove to the vicinity of Troutman Street in Addoloria's car. Collins and Peters drove there in the station wagon. Pursuant to the previously agreed upon plan, Mastrangelo and Flammia drove out to "Forco's" in New Jersey (T. 127-128). Fleischer, Collins, Peters and appellant Addoloria all met at a diner near the Arlene Knitwear Company and had breakfast. Shortly thereafter the victim truck arrived and Addoloria was dispatched to go out and "count the load" (T. 129-130). Upon receiving a pre-arranged signal from appellant Addoloria, Peters went to the station wagon and Collins and Fleischer took their positions in the street (T. 131).[6]

As the truck began to pull away from the loading bay Peters cut off its forward progress with the station wagon. Collins went to the passenger side of the truck with his

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[6] Although the original plan called for both Collins and Fleischer to be armed, Fleischer did not carry a gun that morning. Rather, he left his in appellant Addoloria's car before entering the diner (T. 132-133).

gun and Fleischer approached the driver's side (T. 135). Because the door on Collins' side was locked, he came around, and together, he and Fleischer removed the driver from the cab of the victim truck. Collins led him to Peters' station wagon and got in with him and Peters. Fleischer climbed behind the wheel of the stolen truck and, with appellant Addoloria driving close behind, started for the rendezvous with Mastrangelo and Flammia at Forbes' (T. 137).

When they reached the Williamsburg Bridge they encountered extremely heavy traffic as a result of an unusually heavy rain.[7] Realizing the difficulty they faced in getting to New Jersey, Fleischer and appellant Addoloria agreed to change the original plan, and bring the stolen load to the Airfreight Haulage depot of which Fleischer knew, on West 19th Street in Manhattan (T. 138-139). In order to inform Mastrangelo and the others of this change, appellant Addoloria was told to call Mastrangelo at Forbes' from a diner on 18th Street near 11th Avenue. He then met with Fleischer, as planned, at Airfreight Haulage (T. 139).

When Fleischer arrived at the depot he was met by Sam Weiner, a warehouseman that he had known from his prior employment. Weiner was told that the truck was stolen, and was "conned" by Fleischer into allowing them to use the warehouse as a temporary storage location or "drop" (T. 140).

When appellant Addoloria arrived, moments later, the garage doors were closed and the truck's cargo compart-

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[7] Later in the trial the Court took judicial notice of a certified report of the United States Department of Commerce, reflecting the daily and hourly weather conditions for the week of February 27, 1972 through March 4, 1972. The pertinent portion, for March 3, 1972, showed that .9 inches of rain fell in the New York City Metropolitan area on that day (T. 847-850).

ment was forced open with a tire iron from Addoloria's car (T. 141-142). This activated the truck's alarm system, which was silenced only after Fleischer and Addoloria "ripped every wire out of the truck".[8] Addoloria and Fleischer then began to unload the stolen goods and were doing so when appellant Mastrangelo arrived from New Jersey with Flammia (T. 142). Mastrangelo offered to help with the unloading, but was told that his help was unnecessary. He then went back to his car to wait with Flammia. As the goods were removed from the truck and put aside, the packing slips and invoices were removed for later examination and some sample garments were separated as well (T. 144-145). These were later given to appellant Mastrangelo for removal to Flammia's house (T. 146).

Later, when Fleischer tried to start the truck so that it could be abandoned, they found that in ripping out the wiring they had disabled it. It was at this point that appellant Mastrangelo called Forco's Truck Repair in New Jersey and requested Forbes to send one of his tow trucks to Airfreight Haulage to dispose of the stolen truck (T. 147-148). Arrangements were made, and the tow truck arrived approximately one-half hour later, driven by Gerald Barry (T. 149). Both appellants were present at the warehouse when the tow truck arrived.

Fleischer discussed the situation with Barry (whom he had met on numerous prior occasions at Forbes'), and gave him a radio that had been attached to the dashboard of the stolen truck (T. 150-151). After placing the radio in the tow truck, Barry hooked up the stolen truck and, with Fleischer, towed it to West Street, in Manhattan, opposite the now closed Federal Detention Headquarters

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[8] Approximately three-quarters of an hour later Peters and Collins were to arrive with the kidnapped driver and his keys to the alarm (T. 146).

(T. 152). Addoloria followed behind in his car, picked Fleischer up and then drove back to Flammia's (T. 153). The stolen property was left at Airfreight Haulage with a promise that it would be removed after the weekend. Sam Weiner was given $200 for his trouble, by Mastrangelo (T. 153-154).

Later that afternoon, Fleischer, Peters, Collins, Flammia and the two appellants met at Flammia's to discuss their plans. Peters and Collins told the group that they had left the driver in a cemetery on Woodhaven Boulevard and they settled down to planning the next step (T. 154-155).

## (2) The First Buyers

Discussion was begun, at this point, about what was to be done with the stolen merchandise. Flammia and appellant Mastrangelo announced that they had "reached out to" a buyer named Allicino.[9]

Approximately two hours later Gerald Allicino arrived at Flammia's and was shown the documents and samples by appellant Mastrangelo. It was agreed that he and his partner, Seymour Rosenwasser, would purchase the entire load, and arrangements were made for its delivery to them at a location on Pacific Street in Brooklyn, the following Monday, March 6 (T. 156-158).

After Allicino left, Collins was given the assignment of renting a Ryder truck on March 6, in a fictitious name, and transporting the stolen goods which were still at Air-

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[9] Gerald Allicino and Seymour Rosenwasser are named in related Indictment 75 Cr. 278, and charged with receiving and having these stolen goods in their possession, knowing them to have been stolen, on or about March 6, 1972. They are also charged with conspiracy to receive and possess the goods. As of the writing of this brief that case is awaiting trial.

freight Haulage. He was then to deliver it to the buyers' location in Brooklyn (T. 159-160). Collins said that the truck would be rented with a dead man's license, from a rental establishment on Atlantic Avenue.

After the weekend, on Monday, March 6, 1972, Fleischer, Addoloria, Mastrangelo and the others all met at Flammia's (T. 160). From there, they followed appellant Mastrangelo to a factory on Pacific Street in Brooklyn, where they met with Allicino and Rosenwasser (T. 161-163).

The truck was unloaded and the goods were removed to Rosenwasser's loft factory (which Fleischer described in detail) (T. 164-166). At this point, Allicino and Rosenwasser reneged on Allicino's original commitment to buy the entire stolen shipment, and instead agreed to take only the best third for $2,300 (T. 166-167). Arrangements were made that Allicino would bring the money to Flammia's that night, and that the remaining two-thirds could be left at Rossenwasser's until another buyer was found (T. 167-168).

The appellants and the others then returned to Flammia's house.

### (3) The Second Buyers

A decision had to be made, in light of the new developments, about what to do with the rest of the load. Some telephone calls were made and as a result, Eugene "Chatch" Santore arrived with a man named Lawrence Cesare (T. 170).[10] They met with the entire group, in-

[10] Santore and Cesare were named, along with Soloman Broverman and Wallace Cascio, in a related Indictment (75 Cr. 280). In that indictment all four were charged with illegally receiving and possessing the stolen merchandise, knowing it was stolen, on

[Footnote continued on following page]

cluding appellants, and Santore was sent out, with the samples, to find another buyer (T. 171). Later that evening Santore returned with news that the load was, indeed, sold. He told them that it was to be delivered the following morning, March 7, to a location on Barbey Street, in Brooklyn. In addition, he told them that the price he obtained was $7,700 (T. 172-173).

Later that night Allicino arrived with the promised $2,300, which was divided among the six, with each appellant taking his individual share (T. 173-174).

After Allicino left, the group planned the next day's delivery. It was decided that the Ryder Rental Truck would be used to transport the remainder of the load from Rosenwasser's factory to Barbey Street and that the "crew", as Fleischer described his co-conspirators, would all help in the loading, transfer and unloading (T. 175-176).

On the following morning, March 7, 1972, the entire group, now including Cesare and Santore, met at Flammia's. From there they traveled, in three cars and the truck, to Pacific Street (T. 177-178). There, they met Allicino and Rosenwasser and the ten of them loaded the truck (T. 179-180). Appellant Mastrangelo and Flammia then returned to the latter's house, according to plan, and the rest followed Santore to 152 Barbey Street, the resi-

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March 7, 1972. They were also charged with conspiring to possess the goods. Santore and Broverman were convicted after a jury trial in which Cascio was acquitted. Cesare entered a plea of guilty to the possession count. On January 16, 1976 Broverman was sentenced to a prison term of two years and an aggregated fine of $10,000. (A notice of appeal of this conviction was filed in the District Clerk's office on January 23, 1976 and bears docket number 76-1037 in the Court of Appeals). Cesare was sentenced to a prison term of 2½ years consecutive to a federal sentence he is currently serving on an unrelated narcotics conviction.

dence of Solomon Broverman and his son-in-law, Wallace Cascio (T. 181-182). The sweaters were unloaded into Broverman's house and garage and they were told to return at 2:00 P.M. for the $7,700, thereby giving Broverman sufficient time to withdraw the money from his bank (T. 183-184).

At approximately 2:00 P.M. Fleischer, Peters and Cesare returned to Broverman's and were paid $7,700 in cash (T. 187). They then returned to Flammia's, where they met with the others, including the appellants, and divided the money (T. 188). Cesare was made a partner of the group, which now numbered seven, and given an equal share. In return, Cesare was called upon to help find a new "'drop" or warehouse for the gang to use (T. 188).

## C. The Liz Cartage Company Theft

In the weeks and months following the Arlene Knitwear hijacking, the group, now including Cesare, met with accustomed regularity (T. 191). They continued to discuss various proposed plans or possible subjects for theft, including a number of trucks belonging to the Liz Cartage Company (T. 192).

On May 2, 1972 Peters telephoned Fleischer and told him to meet the rest of the group at Flammia's. When Fleischer couldn't find them there, he checked the location of Liz Cartage and then went home (T. 193-194). The next day Fleischer met Peters at the Eagle Truck Rental establishment, in Maspeth, New York and from there went to the C & P Warehouse.[11] At the warehouse,

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[11] It was explained, later, that "C & P" stood for "Charley Peters" and that this warehouse was the new "drop" or "dump" that Peters and Cesare rented for the group immediately after Cesare joined the gang in March, 1972 (T. 195-195a; 197).

Fleischer met with the rest of the group, including the appellants (T. 198). While there he saw a large quantity of miscellaneous property which he explained had been contained in four trucks previously stolen from Liz Cartage (T. 198-199). On that day Fleischer assisted the others in delivering the stolen merchandise to the C & P Warehouse (T. 200). After efforts were made to sell whatever could be sold, Fleischer arranged, through Sal Coniglio, a friend and the owner of Five Counties Carting, to dispose of the rest as "'garbage" (T. 201-202). At Fleischer's request, Coniglio arranged for a series of garbage pickups to be made at the C & P Warehouse (T. 203).

## D. The Splendorform Brassiere Theft

After the Liz Cartage theft, the group continued to meet and plan hijackings as before (T. 203-204). In early May, 1972 a shipment belonging to the Splendorform Brassiere Company became the topic of these discussions. All were present, including appellants (T. 205). During these discussions it was agreed that a trailer load of brassieres, which were being shipped, in part, by Airfreight Haulage, would be stolen (T. 207-209). Each conspirator was assigned a role in this latest "score", including the appellants. Addoloria was to go to Forbes' in New Jersey to wait for the stolen trailer, and Mastrangelo was to assist Flammia in the actual hold-up of Sam Weiner, the Airfreight Haulage employee (T. 211-212). On May 10, 1972 the theft was carried out exactly according to plan. The trailer was taken to "Forco's", off-loaded and abandoned (T. 215). Each of the hijackers, including each appellant, shared in the proceeds (T. 216-217).

## E. Corroboration of Fleischer

Luther Washington, the victim driver of the Arlene Knitwear Company truck, described the hijacking substantially as had Fleischer (T. 723-740). He corroborated Fleischer on the time, place, and weather (T. 725-726). He too recalled being cut off by the station wagon (T. 733) and being kidnapped by the two men. He described the gun used by Collins and the radio that was given to Barry (T. 734, 729-730).

Bruce Malcolm, an employee of Ryder Truck Rental, identified a rental contract which showed that on March 6, 1972 a man who gave his name and address as "Harold S. Marder, 75 Saint Paul Place, Brooklyn, New York", rented a truck at 7:30 A.M.. The truck was an 18 foot van, and was rented from the Richmond Hill Brake Center, 102-25 Atlantic Avenue, Queens, New York. The truck was returned on March 7, 1972 (T. 755-758).

Mr. Malcolm further identified another contract for a similar rental on March 10, 1972 (T. 760-761).[12]

Harold S. Marder testified that he neither rented any trucks, nor did he ever authorize anyone to do so in his name (T. 767-770).

Special Agent Richard Redman of the Federal Bureau of Investigation, described how he had recovered the stolen truck on March 7, 1972, where it had been abandoned near the intersection of West Street and Bank Street in Man-

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[12] Government Exhibit 15, the second contract, was offered subject to connection. Later in the trial it was connected when Special Agent Stephen A. Gilkerson of the Federal Bureau of Investigation, testified that Exhibit 15 was one of the items found in the C & P Warehouse during a consent search performed at that premise on September 1, 1972 (T. 904, 909).

hattan (T. 697).[13] When the truck was recovered, recalled Redman, the alarm system had been dismantled and thrown into the back (T. 701). He identified a series of photographs he had taken that day and further described the fitting under the dash from which the stolen radio had been removed (T. 704-705).

Agent Redman also identified seven boxes of sweaters that he seized at 152 Barbey Street, the residence of Soloman Broverman, on June 28, 1974 and July 17, 1974 (T. 708-721).[14]

Catherine Nuttila, a branch manager of the Prudential Savings Bank, identified bank withdrawal slips and signature cards showing that on March 7, 1972, Soloman Broverman, of 152 Barbey Street, Brooklyn, New York, withdrew exactly $7,700 in cash from two savings accounts (T. 823-829).

Joseph Concheiro, a special agent with the New York Telephone Company, identified a business record of the telephone company showing that on March 3, 1972, at 11:26 A.M., a telephone call was placed from the office of Airfreight Haulage to telephone number (201) 869-8662, in Union City, New Jersey (T. 832).[15]

Ann Mattaliano, a business office supervisor for the New Jersey Bell Telephone Company, identified a business record of her company which showed that in March, 1972

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[13] The old Federal Detention Headquarters, 427 West Street, is located at the intersection of West Street and Bank Street (T. 697).

[14] Government Exhibits 7, 8, 9, 10, 11, 12 and 13, the boxes of sweaters seized at Broverman's house, were offered subject to connection (T. 719). The connection was later made when Larry Stein, the President of the Arlene Knitwear Company, identified them as part of the load hijacked on March 3, 1972 (T. 785-794).

[15] The record also showed that the number assigned to Airfreight Haulage was (212) 244-5056 (T. 832).

the telephone number assigned to "Charlie's Road Service, 5415 Tonnelle Avenue, North Bergen, New Jersey" was (201) 869-8662 (T. 841). She also identified a business record revealing that on March 3, 1972, at 11:55 A.M. (29 minutes after the first call), a call was made from number (201) 869-8662 [16] to number (212) 244-5056 (T. 842-843).

Andrew S. Coniglio, the former owner of the Five Counties Carting Company, confirmed that in March or April of 1972 he was called by Paul Fleischer, and retained to do the garbage collections at 1471 Hempstead Turnpike, the C&P Warehouse (T. 860-861; 869). He identified certain business documents showing that in May, 1972 his firm did a special "clean-out" at the C&P Warehouse, and that the job was signed for by Charles Peters (T. 868-870).

Howard Lowett, an employee of the Splendorform Brassiere Company, identified business records showing that on May 5, 1972 a container full of finished garments was stolen from Airfreight Haulage, 517 West 19th Street, New York City (T. 879-882). He noted that the container bore markings identifying it as belonging to "TTT" [17], bearing serial number 790675 (T. 880-881).

Special Agent William E. Klotz, of the Hackensack, New Jersey office of the Federal Bureau of Investigation described how, on May 15, 1972, he recovered the stolen container described by Mr. Lowett within five and one-half miles of Charles Forbes' place of business (T. 886-890).

Luis Cuesta, a New York City Police Administrative Aide, testified that a search of the official records of the

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[16] Mrs. Matttaliano also identified another business record which showed that another subscriber name for number (201) 869-8662 was "C. H. Forbes" (T. 842).

[17] Transamerican Trailer Transport (T. 881).

police department revealed no permits to carry firearms issued to either appellant or any of the co-conspirators (T. 850-851; 854-855).[18]

Finally, John Connell, the owner of the property located at 1471 Hempstead Turnpike, identified business records showing that on March 8, 1972 his warehouse was leased by "Charles Peters, doing business as Charlie Peters Storage and Sales, Inc." and that the lease was witnessed by "Lawrence J. Cesare" (T. 940-941). Mr. Connell further recalled that when Peters gave him his first payment he was surprised to see that it was $1,700 in small cash denominations (T. 944).

Following Mr. Connell's testimony the Government rested (T. 956), and the appropriate motions to dismiss and for a directed verdict were denied as to both appellants (T. 956-959).

## II. The Defense Case

Appellant Mastrangelo put in a defense, beginning with the testimony of Dr. Henry Ringelheim, an eye specialist (T. 960-961). After defense counsel pointed the appellant out in the courtroom, the witness testified that he had been his patient since 1966 (T. 962-963). Dr. Ringelheim testified that he recalled treating appellant in 1971 and 1972, for glaucoma, but he could not specify at all how often he saw him, when he saw him or at what time the appointments were for (T. 964-965). In fact, Dr. Ringelheim volunteered that in 1971 and 1972 he recalled seeing appellant ". . . once a week, sometimes twice a week, sometimes more . . ." (T. 968). He said that when Mastrangelo came to his office the appointments were generally for between 10:00 A.M. and 12:30 P.M. (T. 968).

[18] This evidence related to the firearms violation alleged in Count Three.

On cross-examination the doctor remembered that appellant rarely came to his office with anyone (T. 973-974) and that he never had to arrange for someone to assist him when he left (T. 975). Finally, Dr. Ringelheim testified that there were periods of up to two weeks in duration, during 1972, when he did not see the patient (T. 979).

After Dr. Ringelheim's testimony appellant called one character witness (T. 983) and then took the stand himself.[19]

Appellant, on direct examination, admitted that he was capable of driving an automobile, and did drive one, in 1972 (T. 1001).[20] He claimed that between 1971 and 1973, he derived the primary source of his income from a pension and from doing "odd jobs" in the neighborhood. When asked by his attorney if he could tell the jury for whom he did this work, he stated he could not (T. 1010-1011). He admitted to a twenty-five year friendship with Paul Flammia and his family (T. 1014), and to a thirty-five year friendship with his co-defendant Joseph Addoloria (T. 1015).

Appellant conceded knowing Charles Peters (T. 1017), Paul Fleischer and Gerard Collins (T. 1019). He denied,

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[19] Appellant's cross-examination was interrupted when Mr. Mastropieri was permitted to call two additional character witnesses out of order (T. 1057; 1058; 1065). A fourth character witness was called after the defendant's testimony (T. 1177).

[20] In his opening statement to the jury Mr. Mastropieri, appellant's counsel, made the following remarks:

> "And you will also find out that on occasions that Mr. Mastrangelo could not play cards because he could not see the cards, but went [to Flammia's] to occupy some of his time" (T. 53).
>
> * * * * *
>
> Mr. Mastrangelo never went [to New Jersey]. He will so testify that he never went there because he could not drive because of his eye condition" (T. 54).

however, meeting with Addoloria and the others at Flammia's house during the first six months of 1972 (T. 1019-1020). He further denied any participation in or discussions about any hijackings (T. 1021-1022). He admitted that when he went to Flammia's he would sometimes play pinochle or poker (T. 1024).[21] He specifically characterized the testimony of Paul Fleischer as being untruthful with respect to every material point in which he was mentioned (T. 1025-1026; 1031-1036; 1042-1048).

On cross-examination appellant stated that he had no recollection of where he was or what he did on either March 3, 1972 or May 2, 1972 (T. 1100-1101). He conceded the accuracy and veracity of all the physical corroborative evidence of Paul Fleischer (T. 1100-1121; 1122-1125; 1126-1134).

He could offer no explanation, however, of any evil animus that Paul Fleischer might harbor against him or his co-defendant (T. 1159).

Appellant Addoloria rested without putting in a case (T. 1165), and both defendants rested again following a final character witness for appellant Mastrangelo[22] (T. 1193).

Motions to direct a verdict of acquittal pursuant to Rule 29 and renewed motions for mistrial were then denied as to both appellants (T. 1198).

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[21] Compare *supra*, note 20.

[22] *Supra*, note 19.

# ARGUMENT

## POINT I

### The District Court properly admitted evidence of similar acts.

Appellants contend that allowing evidence of prior and subsequent thefts of goods traveling in interstate commerce and their involvement and participation in those thefts and conspiracies, was reversible error.

A more appropriate factual and evidentiary backdrop for this mode of proof would be difficult to imagine, the instant case being exactly the type contemplated by the long-standing and well-settled law in this Circuit, as well as the recent codification of the rule in the Federal Rules of Evidence. Appellant's argument is without merit.

Count Two of the indictment alleged that appellants engaged in a conspiracy, between January 1, 1972 and March 7, 1972 (both dates being approximate and inclusive), to steal a quantity of women's garments which were traveling as part of an interstate shipment, and further to receive and possess them, knowing them to be stolen.

In light of this, the Government offered proof of two other conspiracies in which appellants were involved with each other to commit exactly the same offenses. This proof was offered to substantiate a pattern of conduct engaged in by the appellants of which the crimes charged were a part. *United States* v. *Blasingame*, 427 F.2d 329, 331 (2d Cir. 1970), *cert. denied*, 401 U.S. 945 (1971); *United States* v. *DeSapio*, 435 F.2d 272, 280 (2d Cir. 1970).

It is now almost too well-established to require citation, that "[o]ther crimes evidence is admissible on the government's case in chief unless introduced solely to show the defendant's criminal character, provided that its probative

worth outweighs its potential prejudice." *United States* v. *Torres*, 519 F.2d 723, 727 (2d Cir. 1975).[23]

In the instant case, the government offered evidence of appellants' prior and subsequent involvement in similar conspiracies not to prove their criminal character, but to prove their intent to enter into the conspiracy charged, their knowledge of what they were doing, and the organization and structure, as well as the background and development of the conspiracy. *See, United States* v. *Miller*, *supra*, 478 F.2d at 1318. As uniformly permitted by the cases in this Circuit, and approved by the commentators, such evidence is admissible for those purposes.

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[23] The Second Circuit has consistently upheld this inclusory form of the rule. *See*, e.g., *United States* v. *Santiago*, — F.2d — (2d Cir. Slip. op., pp. 6577, 6582, decided January 12, 1976); *United States* v. *Miranda*, — F.2d — (2d Cir. Slip op., pp. 6545, 6568, decided December 3, 1975); *United States* v. *Campanile*, 516 F.2d 288 (2d Cir. 1975); *United States* v. *Drummond*, 511 F.2d 1049 (2d Cir. 1975); *United States* v. *Papadakis*, 510 F.2d 287 (2d Cir. 1975); *United States* v. *Brettholz*, 485 F.2d 483 (2d Cir. 1973); *United States* v. *Miller*, 478 F.2d 1315 (2d Cir. 1973); *United States* v. *Warren*, 453 F.2d 738 (2d Cir.), *cert. denied*, 406 U.S. 944 (1972); *United States* v. *Birrell*, 447 F.2d 1168 (2d Cir.), *cert. denied*, 404 U.S. 1025 (1972); *United States* v. *Keilly*, 445 F.2d 1285 (2d Cir.), *cert. denied*, 406 U.S. 962 (1972); *United States* v. *Bradwell*, 388 F.2d 619 (2d Cir.), *cert. denied*, 393 U.S. 867 (1968); *United States* v. *Gardin*, 382 F.2d 601 (2d Cir. 1967); *United States* v. *Deaton*, 381 F.2d 114 (2d Cir. 1967); *United States* v. *Bilotti*, 380 F.2d 649 (2d Cir.), *cert. denied*, 389 U.S. 944 (1967); *United States* v. *Knohl*, 379 F.2d 427 (2d Cir. 1967); *United States* v. *Braverman*, 376 F.2d 249 (2d Cir. 1967); *United States* v. *Jones*, 374 F.2d 414 (2d Cir. 1967); *United States* v. *Bozza*, 365 F.2d 206 (2d Cir. 1966); *United States* v. *Klein*, 340 F.2d 547 (2d Cir.), *cert. denied*, 382 U.S. 850 (1965); *United States* v. *Robbins*, 340 F.2d 684 (2d Cir. 1965); *United States* v. *Marquez*, 322 F.2d 162 (2d Cir. 1964); *United States* v. *Ross*, 321 F.2d 61 (2d Cir.), *cert. denied*, 375 U.S. 894 (1963); *United States* v. *Kahaner*, 317 F.2d 459 (2d Cir. 1963); *United States* v. *Eury*, 268 F.2d 517 (2d Cir. 1959).

It is noteworthy that, although not applicable to the instant case (the trial was completed before December 1, 1975), Rule 404(d) of the Federal Rules of Evidence codifies this Circuit's rule.

Appellants' apparent reliance on Wigmore's treatise,[24] for the proposition that it is improper and prejudicial to adduce evidence of a matter not in issue, is, to say the least anomalous. Throughout the trial, during his summation and in oral argument before the Court, Mr. Mastropieri repeatedly cast as one of the issues of the trial whether or not appellant Mastrangelo agreed to, or joined in a conspiracy (T. 1231-1232, 1260-1261). Therefore, for either appellant to now claim that the element of "agreement", in Count Two, was even implicitly conceded is frivolous.

In *United States* v. *Papadakis*, 510 F.2d 287, 294, 295 (2d Cir. 1975), this Court stated:

> "The charge of conspiracy to commit criminal acts always requires proof of a course of conduct that will circumstantially prove the corrupt agreement. There is no more convincing proof to a jury than that of a pattern of conduct which unfolds before their eyes."

Appellants' secondary argument, that the Government was improperly permitted to corroborate the proof of the similar crimes, is equally without merit. In one breath the appellants are heard to complain that the evidence is too strong. In the next breath they aver that it wasn't strong enough. One might reasonably predict that had Fleischer not been corroborated, *that* would be the error cited by appellants. We are aware of no rule (and none

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[24] Wigmore, Evidence, § 39 (3d ed. 1940), cited in Appellant's Brief at p. 16.

is proferred by appellants) requiring similar acts to be proven in any particular manner. The only requirements are those imposed by the traditional "balancing test", and that has been more than satisfied here.[25]

## POINT II

### Appellants have shown neither of the two elements required to justify a dismissal of this indictment for, so-called, "pre-indictment delay".

It is appellants' assertion that because the Government knew of their involvement in the crimes charged as early as 1972 they are entitled to have the indictment dismissed because it was not filed until 1975. In furtherance of this position they claim that this "undue" delay prejudiced them in some way, thereby depriving them of a fair trial.

This position is supported by neither the facts in this case nor the applicable law.

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[25] It is not surprising that the only case appellants cite in support of their position is *United States* v. *DiCicco*, 435 F.2d 478 (2d Cir. 1970), inasmuch as it is the only atypical case among the dozens consistent with the rule. Although never specifically overruled, the rationale of *DeCicco* has not been compelling either. In *United States* v. *Brettholtz*, 485 F.2d 483, 487-488 (2d Cir. 1975), this Court specifically rejected the argument, posited in *DeCicco*, that similar criminal acts are admissible only if that evidence lends support to an element of the crime charged, and only if that element is specifically placed in issue. The Court has put an end to this argument, once and for all, it is submitted, in the very recent decision in *United States* v. *Santiago*, — F.2d — (2d Cir. slip op. pp. 6577, 6582; decided January 12, 1976) where it was held that:

> ". . . evidence of relevant similar acts, including other crimes, is admissible *for all purposes except to show defendant's criminal character or disposition.*" (emphasis added).

*See also, United States* v. *Gerry*, 515 F.2d 130 (2d Cir. 1975).

The controlling decision in the area of, so-called, "pre-indictment delay" is *United States* v. *Marion*, 404 U.S. 307 (1971). There, the Supreme Court synthesized, we believe, a two-pronged test, both parts of which have to be satisfied before an indictment will be dismissed. First, the defendant must satisfy the burden of showing that he has been actually prejudiced by the delay. Second, it must be shown that the delay was part of an intentional plan, on the part of the Government, to gain an unfair tactical advantage over the defendant. Neither is shown by either appellant in this appeal.[26]

Appellants seem to assert that, because time has passed since March, 1972, they are "automatically" prejudiced because they are "unable to reconstruct the critical day in question" (Appellants' Brief, at p. 20). This same point was argued to the trial court without success. It should be given no greater import now (A. 29-31).

*Marion* speaks directly to this argument, saying:

> "Passage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses and otherwise interfere with his ability to defend himself. But this possibility of prejudice at trial is not itself sufficient reason to wrench the Sixth Amendment from its proper context. Possible prejudice is in-

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[26] Although this Court has not had the opportunity, as yet, to decide the issue definitively (*See, e.g., United States* v. *Finklestein*, — F.2d — (2d Cir. Slip op., pp. 841, 854, decided December 1, 1975); *United States* v. *Foddrell*, — F.2d — (2d Cir. Slip. op., p. 5161, decided July 28, 1975)), we feel that the intent of *Marion* is clear; that both "actual prejudice" *and* an affirmative plan, on the part of the prosecution, to foster the delay in order to obtain an unfair tactical advantage, must be proven before the indictment will be dismissed. *United States* v. *Brasco*, 516 F.2d 816 (2d Cir. 1975); *United States* v. *Brown*, 511 F.2d 920, 923 (2d Cir. 1975).

herent in any delay, however short; it may also weaken the Government's case." *Supra*, at 321-322.

In sum, as to prejudice, in order for that argument to succeed, there must be a substantially greater showing of actual prejudice than the self-serving, conclusory statements presented here. In *Marion* no prejudice was found, with facts and circumstances presented which were, arguably, stronger than those before this Court.

In an attempt to satisfy the second part of the *Marion* requirement, appellants suggest that this Court has no choice but to infer an evil motive on the part of the Government, simply because the case was not indicted in June, 1972 (Appellant's Brief, at p. 20). It is most respectfully submitted that such a position is not logical. If this were so there would be no viable applicability or necessity for statutes of limitation. Such an argument is not supported by *Marion*, although that case is cited to that end by appellants:

> "The law has provided other mechanisms to guard against possible, as distinguished from actual prejudice resulting from the passage of time between crime and arrest or charge. As we said in *United States* v. *Ewell* [citation] 'the applicable statute of limitations . . . is . . . the primary guarantee against bringing overly stale criminal charges.'" *Supra*, at 322.

Finally, appellants' assertion that they are not now barred from raising this issue on appeal is not meritorious (Appellants' Brief, p. 19, footnote).

Although it is claimed that the defense first became aware of the delay at trial, the record is clear that no mention whatsoever, was made of it until well into the seventh day of the trial, after the Government had rested

and, in fact, after the entire defense case had been presented (T. 1196).

Reasoning by analogy, we submit that a claim of pre-indictment delay not raised before the trial, is waived. Cf. *United States* v. *Mauro*, 507 F.2d 802 (2d Cir. 1975); *United States* v. *Favolaro*, 493 F.2d 623, 626 (2d Cir. 1974); *United States* v. *Infanti*, 474 F.2d 523, 528 (2d Cir. 1973). Appellants had ample opportunity, through the use of discovery and their rights to particulars, to ascertain that there might be such an issue in the case. Further, in this case it was clear from the indictment itself that more than three years had elapsed between the dates alleged and time of filing. They should not now be heard to complain of a matter not broached at the appropriate time.

## POINT III

### Judge Platt's comments to defense counsel Mastropieri were, at all times, appropriate and proper under the circumstances.

Appellants urge this Court to overturn their convictions because they, assertedly, were deprived of a fair trial as a result of the judge's remarks to counsel for the appellant Mastrangelo which served to "belittle, humiliate and intimidate" him.

Even a cursory reading of the record shows that, not only were any critical remarks of the Court wholly appropriate but indeed they were necessary in order to check the gross misrepresentation being perpetrated by Mr. Mastropieri.[27]

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[27] *Compare, United States* v. *Estremera*, — F.2d — (2d Cir. slip op., pp. 1693, 1704, decided February 2, 1976), in which this Court recently acknowledged the necessity, on some occasions, for a trial judge to "set the record straight." *See also, United States* v. *DeAngelis*, 490 F.2d 1004, 1010-1012 (2d Cir. 1974) (concurring opinion).

In order to obtain an overall view of the trial atmosphere, the earlier proceedings should be considered as well.

## 1. The $100 fine.

On April 21, 1975, the day that appellant Mastrangelo surrendered, he was accompanied and represented by his attorney of record, Leonard Eisenberg, Esq. (Appellant's Appendix, p. 1; hereinafter cited as "A.").

On every subsequent occasion, prior to the first trial date,[28] Mr. Eisenberg appeared and never once represented that he might not be trying the case. Only on June 23, 1975, after all pre-trial discovery and particulars had been given by the Government, and eight lawyers were present in Court to begin what promised to be a lengthy trial, did Mr. Mastropieri first appear and announce that *he* represented Mr. Mastrangelo. He further stated that he could not possibly begin the trial because of prior commitments to the New York City Council, of which he was a member. The trial was postponed for three months (A. 1).

On September 23, 1975 the case was called again. All the lawyers were present, with the exception of Mr. Mastropieri, who arrived late. It was then that he was fined $100, with execution of remittance suspended until the completion of the trial (A. 3; 46-47).

It is well-settled that the dignity and authority of the Court may be insured by use of the contempt power. *See e.g., United States* v. *Anonymous*, 215 F. Supp. 111, 113 (D.C. Tenn. 1963). The minimal fine imposed here was eminently reasonable, especially in light of the fact that the attorney was given the opportunity to purge his contempt by simply being prompt.[29]

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[28] The first trial date was fixed for June 23, 1975 (A. 1).

[29] In fact, the fine was vacated and the jury was never informed of the incident at all.

## 2. The trial.

More serious, however, were the numerous incidents in which it became necessary to restrain Mr. Mastropieri from disregarding the instructions of the Court and knowingly misrepresenting the facts to the jury.

Almost immediately upon commencing his cross-examination of Fleischer, Mr. Mastropieri began an inquiry into the identity and location of Fleischer's wife (T. 413-415).[30] Although three objections were sustained in rapid succession, Mr. Mastropieri persisted in pursuing this line, despite a clear admonition from the Court (T. 415). Finally, after hearing the Court's warning that his questioning was impermissible, he again insisted and the jury was excused. At that point the Court made it explicitly clear to him that it would not tolerate a deliberate flaunting of its rulings (T. 415-416).[31] Notwithstanding the colloquy outside the jury's presence, this same line of questioning was again pursued on their return, resulting in no fewer than five objections being sustained within two pages of testimony (T. 417-418).

On the very heels of this, the following cross-examination occurred:

> "[Mr. Mastropieri]: What was your capacity at the Airfreight Company when you got married in 1970?

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[30] Fleischer had previously testified that one of the reasons he began cooperating with the authorities was that his life and his wife's had been threatened by Charles Peters and Lawrence Cesare (T. 222-223). In addition, the Court had already ruled irrelevant this line of cross-examination (T. 378-380).

[31] It is interesting to note that Mr. Mastropieri, apparently fully expecting the reprimand, asked that it be done outside the presence of the witness (T. 415).

[Fleischer]: I believed it was 275 a week.

Q. No what did you do? Were you a truck driver? A. Right.

Q. And you stayed there until when? A. I worked there until about two months after I was married.

Q. You got married in June? Is that what— A. No. I got married in August.

Q. In August of 1970? A. Right. *And I quit in September, the end of September.*

Q. *You said you quit or—* A. *Yes.*

Q. *Or were you fired?* A. *Quit.*

Q. *Were you fired as a result of—*" (T. 418; Emphasis supplied).

The Government objected and the Court properly instructed the jury that only the answers were evidence, never the lawyers' questions (T. 419). At the sidebar Mr. Mastropieri made an unequivocal representation to the Court that his question was based on the good faith belief that Fleischer was lying, which belief was based on "§ 3500" material supplied by the Assistant United States Attorney (T. 419-421). On that basis, Judge Platt permitted him to continue by asking the witness whether he'd ever told the Assistant United States Attorney that he'd been fired, which Fleischer again denied. After reviewing the particular Jenck's Act exhibit [32] that had been indicated by Mr. Mastropieri, counsel for the Government asked for a sidebar. The Court refused, but the matter was raised shortly thereafter after the jury had been excused for the day (T. 422; 428-436). It was then that the Court was shown that, although Mr. Mastropieri well knew that there was absolutely nothing in the § 3500 material to show that Fleischer was being anything but truthful on this point, he intentionally tried to mislead the

[32] Exhibit 3500-46 consists of several pages of handwritten notes made by the prosecutor in preparation for trial. Copies of this exhibit will be made available to the Court at oral argument.

jury into believing that the witness was lying. It was in *this* context, therefore, that Judge Platt "accused Mr. Mastropieri of mispresenting facts" (Appellant's Brief, p. 23) for, indeed, he had (T. 440-446).[33]

Exactly the same thing occurred again, four days later, when Mr. Mastropieri asked Fleischer whether he ever advised the Assistant United States Attorney that he had started to hijack trucks in 1967 (T. 475). The Government attorney objected and the following sidebar discussion ensued:

> "Mr. Levin-Epstein: Your Honor, this is that same 3500 material. I would ask Mr. Mastropiere [sic] to show the Court and me where in there it says anything that suggests that Fleischer told me he started to hijack trucks in '67.
>
> The Court: Is there anything in there to that effect?
>
> Mr. Mastropiere [sic]: I don't think so.
>
> The Court: You may not pursue this type of question which implies he has told somebody something and then there is a contradiction, unless you have a basis for it—
>
> Mr. Mastropiere [sic]: I did. I just asked him questions and answers of Thursday.
>
> The Court: You just implied to the jury that he told Mr. Levin-Epstein that and that is dirty pool. I'm going to tell the jury. That is twice now you have done it." (T. 475-476).

It was only *then* that the instruction quoted in Appellant's Brief (p. 23) was given to the jury (T. 476).

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[33] Standard 7.6(d) of the ABA Standards Relating to the Defense Function states: "It is unprofessional conduct to ask a question which implies the existence of a factual predicate which the examiner knows he cannot support by evidence."

Once again Mr. Mastropieri had misrepresented the facts to the jury, and once again the jury was correctly instructed on the law.

If, in fact, Mr. Mastropieri was "belittled" or "humiliated", it was something he brought upon himself.

A considerable portion of Mr. Mastropieri's cross-examination of Fleischer was devoted to his (Fleischer's) relationship to hijackers with whom he'd been formerly associated: Walter Krissa, Anthony DiGiovanni, Vincent Creazzo and Robert Parthesius (T. 477-493; 497-510; 512-513).[34] The clear thrust of this cross-examination was that Fleischer had, indeed, hijacked the Arlene Knitwear truck, but with Creazzo, DiGiovanni and the others, not with Mastrangelo (T. 575; 627). Based upon what Mr. Mastropieri knew, this suggestion to the jury was, in the Court's opinion, wholly improper (T. 631).[35]

It is important to note, we feel, that this insinuation of the guilt of former clients (see, *United States* v. *Estremera*, *supra*) in the nature of an implicit alibi for his present client was accomplished in a particularly galling manner.[36]

By repeatedly phrasing his questions to Fleischer in a particular manner, Mr. Mastropieri left the jury with

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[34] Mr. Mastropieri indicated, on more than one occasion, that he too had been associated with these men, in his capacity as an attorney (T. 485-486; 637-638).

[35] Charles Peters, Paul Flammia and Gerard Collins entered their pleas of guilty to Count Three of the indictment on September 23, 1975, the day the trial began, as Mr. Mastropieri and his client sat in the well of the Courtroom and watched (A. 3).

[36] We say "galling" because it became clear that Mr. Mastropieri was cross-examining the witness with respect to a conversation had between the two of them at a meeting attended by his former clients, Fleischer and "Mr. Eisenberg, of [my] office" (T. 489). This, at least, gave the appearance of further impropriety.

the unavoidable impression that he himself had personal knowledge of the facts (T. 412; 485; 575; 627; 631); he was warned by the Court, to avoid this impression, lest he find himself on the witness stand, a prospect he apparently welcomed (T. 489-493).

It bespeaks a certain temerity for the defense to now claim foul, in light of this record. *See, United States* v. *DeAngelis, supra,* Cf. *United States* v. *Puco,* 436 F.2d 761 (2d Cir. 1971); *United States* v. *Block,* 88 F.2d 618 (2d Cir. 1937).

Although apparently prepared to give one curative instruction to the jury, the Court acceded to the Government's request that Mr. Mastropieri merely make some offer of proof as to the good-faith basis upon which he relied. He was unable to make such an offer (T. 632-640). It was in *this* context that the remark was made about the possibility of the matter being referred to the Bar Association. This was perfectly appropriate, it is submitted, under the circumstances.[37]

Not one of the, so-called, "humiliating" statements to counsel was made in the presence of the jury. The three incidents referred to in Appellant's Brief occurred during a cross-examination which took two trial days to complete and almost two hundred fifty pages of testimony.[38] In the perspective of the case they might well be considered *de minimus.*

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[37] *See,* A.B.A. Code of Professional Responsibility, Canon 7, DR 7-102(A)(6):

"In his representation of a client, a lawyer shall not:

* * *

(b) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false."

[38] Fleischer's cross-examination by Mr. Mastropieri actually continued from September 25, 1975 to September 30, 1975, with a three-day break in the middle.

In an apparent last-ditch effort to overturn the convictions, appellants finally contend that the convictions should be reversed because no specific instruction was given to the jury to discern any personal impressions of the court or counsel they might have in determining appellants' guilt or innocence. The record is clear that no such request was ever made by either attorney during the trial and therefore giving it rested within the sound discretion of the Court. Judge Platt did, of course, instruct the jury that they were to consider only relevant evidence in reaching their verdict (T. 6; 1317; 1320; 1349-1351) and specifically that they should not allow prejudice or personal feelings about an attorney to affect their verdict (T. 1358). Finally, the Court clearly instructed the jury that they should in no way interpret anything the Judge has said as being any "indication of the Court's opinion as to the facts in evidence" (T. 1358-1359). Counsel for neither appellant took exception to the charge (T. 1364-1365).

## POINT IV

### The evidence was sufficient to sustain the jury's guilty verdict.

Appellants contend that insufficient evidence was adduced in this case to support proof of their guilt beyond a reasonable doubt. This assertion is frivolous.

The now well-accepted benchmark to test the sufficiency of a criminal verdict was set out by Judge Friendly in *United States* v. *Taylor*, 464 F.2d 240, 244-245 (2d Cir. 1972). It is the same test applicable by a District Court in deciding a motion for judgment of acquittal notwithstanding a guilty verdict. *Curley* v. *United States*, 160 F.2d 229, 232-33 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947). It is for this Court to determine whether the evidence presented to the jury provided sufficient basis for a reasonable mind to

> ". . . fairly conclude guilt beyond a reasonable doubt . . . [I]f there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the [Rule 29] motion must be granted. If [the Court] concludes that either of two results, a reasonable doubt or no reasonable doubt, if fairly possible, [it] must let the jury decide the matter."

Moreover, in determining the sufficiency of the evidence, conflicts between witnesses must be resolved in favor of the United States, and the total evidence adduced must be examined in the light most favorable to it. *United States* v. *Glasser*, 315 U.S. 60, 80 (1942).

According to Appellant's Brief, the jury could not have possibly credited anything Fleischer said. Yet, they had the opportunity to see and hear both Fleischer and the appellant Mastrangelo testify. This weighing of the credibility of the witnesses speaks for itself.

Applying these basic principles to the facts of the instant case, it is plain that the evidence is more than sufficient. It is adequate restatement of the facts, here, to point out that Fleischer gave a detailed and specific account of appellants' involvement.[39] As noted, he was corroborated in every material respect. Both the direct and circumstantial evidence in the case compel the verdict returned.[40]

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[39] It is not felt that even a summary review of the evidence, at this point would be anything but redundant and tedious. For a detailed explication of the facts, the Court is most respectfully referred to the Statement of Facts, *supra*, at pp. 3-19.

[40] Where an essential element of the offense has been proven by circumstantial evidence, the evidence need not exclude every reasonable hypothesis inconsistent with the guilt of the defendant. The jury may draw a particular inference in support of an essential allegation even though an opposite inference may be drawn from the evidence in proof. In considering the totality of the case the jury may "color" any one fact with the other facts adduced. *United States* v. *Taylor*, 464 F.2d 240, 244-45 (2d Cir. 1972).

## CONCLUSION

**The judgments of conviction should be affirmed.**

Dated: February 13, 1976

Respectfully submitted,

DAVID G. TRAGER,
*United States Attorney,*
*Eastern District of New York.*

PAUL B. BERGMAN,
ETHAN LEVIN-EPSTEIN,
*Assistant United States Attorneys,*
*of Counsel.*

Form No. USA-52a-6a
(Rev. 1-29-71)

# AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

LYDIA FERNANDEZ, being duly sworn, says that on the 17th day of February, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a Brief for the Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

| | |
|---|---|
| Eugene F. Mastropieri, Esq. | Harold L. Goerlich, Esq. |
| 67-40 Myrtle Avenue | 380 No. Broadway, Suite 100 |
| Glendale, N. Y. 11227 | Jericho, N. Y. 11753 |

Sworn to before me this
17th day of February, 1976

Olga P. Morgan
Notary Public, State of New York
Qualified in Kings County
Commission Expires March 30, 1977

Lydia Fernandez
LYDIA FERNANDEZ

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PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____ duly entered herein on the ____ day of _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,
Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

_____ Action No._____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____
United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____ is hereby admitted.
Dated: _____, 19____

_____
Attorney for _____

FPI-LC-SM-8-73-7385